# MacQuire (Malaysia) Sdn Bhd v HSBC Bank Malaysia Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–03–10 OF 2006 AND W-03–11 OF 2006
MOKHTAR SIDIN, ZULKEFLI AND LOW HOP BING JJCA
17 SEPTEMBER 2007

*Civil Procedure — Default judgment — Setting aside — Application for — Application made by appellant in whose favour default judgment had been entered — Whether court vested with jurisdiction to consider and determine application — Whether court functus officio after default judgment had been perfected — Rules of the High Court 1980 O 42 r 13, O 92 r 4*

*Civil Procedure — Default judgment — Setting aside — Application for — Application made by appellant in whose favour default judgment had been entered — Principles for exercise of inherent powers of court to set aside default judgment — Whether appellant's application an abuse of process — Whether there was a mistake by appellant to enter default judgment*

The plaintiff ('appellant') had a current account with HSBC Bank Malaysia Bhd, the first defendant ('first respondent'). In 1998, 117 cheques (the 'cheques') were paid out by the first respondent and a total amount of RM483,591.21 was debited from the appellant's current account (the 'said amount'). The appellant alleged that the signatures on those cheques were forged by the second respondent and claimed against the first respondent, on the ground that the forged cheques were wholly inoperative and that the first respondent was negligent in debiting the said amount from the respondent's current account. The appellant also claimed against the second respondent, for having fraudulently converted the cheques to her own use or, alternatively, for monies had and received. The appellant's claims were expressly pleaded and premised on joint and several liabilities. In its original defence, the first respondent did not plead that the appellant must elect to claim against either one of the two respondents or against both. Subsequently, the appellant entered default judgment against the second respondent ('default judgment'). The first respondent's then requested for time to obtain an expert's report in relation to the signatures on the cheques. At that material time, the first respondent's did not indicate that the defence of election would be raised. Meanwhile, the appellant served on the first respondent the draft default judgment for the latter's approval. It was returned duly approved. Later, the first respondent asked the appellant whether the sealed default judgment has been extracted. When the answer was in the affirmative, the first respondent instantly gave notice of the defence of election. The first respondent applied to amend its defence to aver that as the appellant had elected to claim against the second respondent by entering the default judgment, the plaintiff was now estopped from claiming against the first respondent. The Court of Appeal on appeal

allowed the first respondent's application and granted leave to the first respondent to amend its defence in terms as alluded to above in *HSBC Bank Malaysia Bhd v MacQuarie Technologies (Malaysia) Sdn Bhd* [2004] 4 MLJ 398. The plaintiff filed an application to set aside the default judgment (the 'impugned application'). These were two related appeals by the appellant whereby the impugned application was dismissed.

**Held**, dismissing the appeal:

(1) Order 42 rule 13 of the Rules of the High Court 1980 ('RHC 1980') conferred jurisdiction upon the High Court to set aside an order or judgment on the application of the party against whom the order or judgment has been obtained. For that purpose, the application must be made and served on the party who has obtained the order or judgment. However, in the instant appeal, the impugned application was not made by the second respondent against whom the judgment has been obtained. It was instead made by the appellant in whose favour the judgment has been entered. Nevertheless, the High Court is vested with the jurisdiction to consider and determine the impugned application. This is supported and consistent with O 92 r 4 of the RHC 1980 which provides for the inherent powers of the Court (see para 22–33).

(2) The principles enunciated in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; *Badiaddin bin Mohd Mahadin & Anor v Arab Malaysian Finance Bhd* [1981] 1 MLJ 393; and*Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors)* [2003] 1 MLJ 251 supported the appellant's contention that the court was not functus officio even though a default judgment has been perfected. However, these three authorities have also reaffirmed that the jurisdiction to set aside such a judgment was not to be exercised as a matter of course, but may be exercised in limited circumstances only where there was: (a) breach of the rules of natural justice; (b) lack of jurisdiction; (c) illegality, ie, contravention of a substantive statutory provision; (d) serious defect; or (e) fraud. The appellant must discharge the burden of proving that the impugned application came within the ambit of any of these limited circumstances (see paras 41–42).

(3) The impugned application was made for the purpose of forestalling, preempting or preventing the first respondent from raising the issue of election in the amended defence at the trial, where the merits or otherwise thereof would have to be considered and determined in due course. The impugned application, if allowed, would have the effect of stifling or negating the earlier order of the Court of Appeal in *HSBC Bank Malaysia Bhd v MacQuarie Technologies (Malaysia) Sdn Bhd* [2004] 4 MLJ 398. It was an abuse of the process of the court which should not be permitted and which O 92 r 4 of the RHC 1980 sought to prevent (see para 50).

(4) The default judgment has been obtained by the appellant who must have properly and meticulously considered the implications thereof. Had there been a mistake, the appellant would have refrained from sending the draft copy of the default judgment for approval by the first respondent, who had duly

A approved and returned it to the appellant for eventual perfection. Further, the appellant had made no effort to rectify the mistake timeously. It was only after some 47 months that they took steps to file the impugned application. As they had not moved quickly to apply to set aside the default judgment, the irresistible inference was that they were holding affirmatively and positively to the default judgment. The delay in filing the impugned application was somewhat inordinate, and the act the appellant in obtaining the default judgment can hardly be construed as a mistake (see para 53–54).

**[Bahasa Malaysia summary**

C Plaintif ('perayu') memiliki akaun semasa dengan HSBC Bank Malaysia Bhd, defendan pertama ('reponden pertama'). Pada tahun 1998, 117 cek-cek ('cek-cek') telah dibayar oleh responden pertama dan jumlah sebanyak RM483,591.21 telah didebitkan daripada akaun semasa perayu ('jumlah tersebut') perayu telah mendakwa bahawa tandatangan-tandatangan cek-cek tersebut telah dipalsukan oleh responden kedua dan menuntut terhadap responden pertama, atas alasan bahawa cek-cek palsu adalah tidak berkuatkuasa sepenuhnya dan responden pertama telah cuai dalam mendebitkan jumlah tersebut daripada akaun semasa responden. Perayu juga menuntut terhadap responden kedua, kerana telah memalsukan menukarkan cek-cek kepada kegunaannya sendiri atau, secara alternatif, untuk wang-wang yang ada dan telah diterimanya. Perayu telah menuntut yang diplidkan dengan jelas dan bersandarkan kepada liabiliti-liabiliti bersesama dan berasingan. Dalam pembelaan asalnya, responden pertama tidak memplidkan bahawa perayu mesti memilih untuk menuntut terhadap salah seorang daripada responden-responden atau terhadap kedua-duanya. Kemudiannya, perayu memasukkan penghakiman ingkar terhadap responden pertama ('penghakiman ingkar'). Responden pertama kemudiannya memohon masa bagi mendapatkan laporan pakar berkenaan tandatangan cek-cek. Pada setiap masa material, responden pertama tidak menunjukkan bahawa pembelaan pilihan akan dibangkitkan. Sementara itu, perayu telah menyerahkan ke atas responden pertama draf penghakiman ingkar untuk pengesahan yang sebelumnya. Ia telah dikembalikan seperti yang sepatutnya disahkan. Kemudiannya, responden pertama bertanyakan kepada perayu sama ada penghakiman ingkar termeterai telah dikeluarkan. Apabila jawapan adalah ya, responden pertama dengan segera memberikan notis untuk pembelaan pilihan. Responden pertama memohon untuk meminda pembelaannya bagi menyatakan bahawa oleh kerana perayu telah memilih untuk menuntut terhadap responden kedua dengan memasukkan penghakiman ingkar, plaintif telah diestop dari menuntut terhadap responden pertama. Mahkamah Rayuan atas rayuan telah membenarkan permohonan responden pertama dan memberikan kebenaran kepada responden pertama untuk meminda pembelaannya dalam syarat-syarat seperti dimaksudkan di atas dalam *HSBC Bank Malaysia Bhd v MacQuarie Technologies (Malaysia) Sdn Bhd* [2004] 4 MLJ 398. Plaintif telah memfailkan satu permohonan untuk mengenepikan penghakiman ingkar ('permohonan pertikaian'). Terdapat dua rayuan yang berkaitan oleh perayu yang dengannya permohonan pertikaian telah ditolak.

**Diputuskan**, menolak rayuan

(1) Aturan 42 Kaedah 13 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT 1980')

memperuntukkan bidang kuasa ke atas Mahkamah Tinggi untuk mengenepikan satu perintah atau penghakiman ke atas permohonan pihak terhadap sesiapa perintah atau penghakiman telah diperolehi. Untuk tujuan itu, permohonan mesti dibuat dan diserahkan kepada pihak yang telah memperolehi perintah dan penghakiman. Sebaliknya, ia telah dibuat oleh perayu di mana penghakiman yang diperolehi telah menyebelahinya. Namun, Mahkamah Tinggi terletak hak dengan bidang kuasa untuk menimbangkan dan menentukan permohonan pertikaian. Ini telah disokong dan selaras dengan A 92 k 4 KMT 1980 yang menyediakan kuasa sedia ada mahkamah (lihat perenggan 22–33).

(2) Prinsip-prinsip yang disebut dalam *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; *Badiaddin bin Mohd Mahadin & Anor v Arab Malaysian Finance Bhd* [1981] 1 MLJ 393; dan *Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors)* [2003] 1 MLJ 251 telah menyokong pendapat perayu bahawa mahkamah tidak functus officio walaupun satu penghakiman ingkar telah disempurnakan. Walau bagaimanapun, ketiga-tiga autoriti ini juga telah mengesahkan bahawa bidang kuasa untuk mengenepikan penghakiman seperti itu tidak akan diamalkan sebagai perkara yang sudah menjadi satu kelaziman, tetapi akan diamalkan dalam keadaan-keadaan tertentu hanya jika terdapat: (a) kemungkiran peraturan keadilan asasi; (b) kekurangan bidang kuasa; (c) penyalahan undang-undang seperti, menyalahi peruntukan substantif statut; (d) kecacatan yang serius; atau (e) penipuan. Perayu hendaklah melaksanakan beban pembuktian bahawa permohonan pertikaian adalah dalam lingkungan daripada sebarang keadaan-keadaan terhad ini (lihat perenggan 41–42).

(3) Permohonan pertikaian telah dibuat bagi tujuan menghalang, mengganti atau mencegah responden pertama dari membangkitkan isu pilihan dalam pindaan pembelaan semasa perbicaraan, apabila merit-merit atau sebaliknya akan dipertimbangkan dan ditentukan apabila tiba masanya. Permohonan pertikaian, jika dibenarkan, akan memberi kesan yang merimaskan atau akan mensia-siakan perintah terdahulu Mahkamah Rayuan dalam *HSBC Bank Malaysia Bhd v MacQuarie Technologies (Malaysia) Sdn Bhd* [2004] 4 MLJ 398. Ia adalah penyalahgunaan proses mahkamah yang tidak sepatutnya dibenarkan dan yang mana A 92 k 4 KMT 1980 juga cuba mencegahnya (lihat perenggan 50).

(4) Penghakiman ingkar telah diperolehi oleh perayu yang secara betul dan teliti setelah mempertimbangkan kesan-kesannya. Jika terdapat sebarang kesilapan, perayu sepatutnya dihalang daripada menghantar salinan draf penghakiman ingkar untuk pengesahan responden pertama, yang telahpun mengesahkannya dan mengembalikannya kepada perayu yang akhirnya disempurnakan. Selanjutnya, perayu tidak membuat sebarang usaha untuk mengubah kesilapan pada masanya. Ia hanya selepas 47 bulan bahawa mereka mengambil langkah-langkah untuk memfailkan permohonan pertikaian. Memandangkan mereka tidak bertindak cepat memohon untuk mengenepikan penghakiman ingkar, kesimpulan yang tidak dapat dibendung adalah mereka telah mengakuinya secara positif kepada penghakiman ingkar. Kelewatan

memfailkan permohonan pertikaian adalah agak keterlaluan, dan tindakan perayu mendapatkan penghakiman ingkar bolehlah ditafsirkan sebagai satu kesilapan (lihat perenggan 53–54).]

**Notes**

For cases on setting aside, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2118–2148.

**Cases referred to**

*Badiaddin bin Mohd Mahadin & Anor v Arab Malaysian Finance Bhd* [1981] 1 MLJ 393 (refd)

*Bank of Nova Scotia, The v Kostuchuk* [2003] 173 Man R(2d) (refd)

*Cannan and Ors v Reynolds and Service* 5 EL & BL 299 (refd)

*City of Westminster v Reema Construction Ltd and Others* 20 Con LR 44 (refd)

*Cross & Co v Mathews & Wallace* (1903–1904) Vol XX TLR 603 (refd)

*HSBC Bank Malaysia Bhd v MacQuarie Technologies (Malaysia) Sdn Bhd* [2004] 4 MLJ 398 (refd)

*Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (refd)

*MacQuarie Bank Ltd v Beaconsfield and Others* [1992] 2 VR 461 (refd)

*S Kaprow & CA LTD v Maclelland & Co LTD* [1948] 1 KB 618 (refd)

*Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors)* [2003] 1 MLJ 251 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 42 r 13, O 92 r 4

**Appeal from**: Suit Nos D7–22–714 of 2000 and D7–22–713 of 2000 (High Court, Kuala Lumpur)

*Su Tiang Joo (Cheah Teh & Su) for the appellant.*

*Andrew Chiew Ban Vooi (Lee Hishammuddin Allen & Gledhill) for the first respondent.*

**Low Hop Bing JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** These two related appeals viz Court of Appeal Civil Appeal No W–03–10 of 2006 ('Civil Appeal No 10') and Civil Appeal No W–03–11 of 2006 ('Civil Appeal No 11') were lodged by the appellant-plaintiff ('the plaintiff') against the decision of the learned judge of the Kuala Lumpur High Court given on 8 December 2005 whereby the plaintiff's application, to set aside the default judgment which the plaintiff had entered against the second respondent ('the second defendant') on 16 January 2001, was dismissed with costs.

**[2]** The facts, issues and parties in these two appeals are the same. Submissions were presented in Civil Appeal No 11. The parties have agreed that the decision of this court in Civil Appeal No 11 would be binding on the parties in Civil Appeal No 10.

**[3]** After hearing submissions, we have on 9 January 2007 unanimously dismissed Civil Appeal No 11 with costs. These are our grounds of judgment. (For brevity and convenience, a reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980, unless otherwise stated).

FACTUAL BACKGROUND

**[4]** The plaintiff had a current account with HSBC Bank Malaysia Bhd, the first defendant. In 1998, 117 cheques were paid out by the first defendant and a total amount of RM483,591.21 was debited from the plaintiff's current account.

**[5]** The plaintiff alleged that the signatures on these cheques were forged by the second defendant and claimed against:

(a) the first defendant, on the ground that the forged cheques are wholly inoperative and that the first defendant was negligent in debiting the above amount from the plaintiff's current account; and

(b) the second defendant, for having fraudulently converted the cheques to her own use or, alternatively, for monies had and received.

**[6]** The plaintiff's claims are expressly pleaded and premised on joint and several liabilities.

**[7]** In its original defence, the first defendant did not plead that the plaintiff must elect to claim against either one of two defendants or against both.

**[8]** On 16 January 2001, the plaintiff entered default judgment against the second defendant who failed to turn up for case management.

**[9]** First defendant's counsel then requested for time to obtain an expert's report in relation to the signatures on the cheques. At the material time, first defendant's counsel did not indicate that the defence of election would be raised.

**[10]** Further case management was fixed for 23 February 2001. Meanwhile, on 22 January 2001, plaintiff's counsel served on defendant's counsel the draft judgment for the latter's approval. It was returned duly approved on 29 January 2001.

**[11]** On further case management dated 23 February 2001, defendant's counsel asked for time to study the expert's report. Case management was then fixed for 29 March 2001.

**[12]** On 29 March 2001, at the request of both parties, trial dates were fixed. On 4 October 2001, pursuant to another case management, parties were directed to file the necessary documents and witness' statements by 22 October 2001.

**[13]** On 25 October 2001, first defendant's counsel asked plaintiff's counsel whether the sealed default judgment has been extracted. When the answer was in the affirmative, first defendant's counsel instantly gave notice of the defence of election.

**[14]** On 5 November 2001, the first defendant applied to amend its defence to aver that as the plaintiff had elected to claim against the second defendant by entering judgment against the second defendant, the plaintiff is now estopped from claiming against the first defendant. That application was dismissed by the learned judge on 5 February 2002.

**[15]** On 28 February 2002, the first defendant appealed to this court. On 15 April 2004, this court allowed the first defendant's appeal and granted leave to the first defendant to amend its defence in terms as alluded to above: *HSBC Bank Malaysia Bhd v MacQuarie Technologies (Malaysia) Sdn Bhd* [2004] 4 MLJ 398; per Nik Hashim JCA (now FCJ).

**[16]** On 14 May 2004, the plaintiff filed an application seeking leave to appeal to the Federal Court. The plaintiff's application for leave was dismissed by the Federal Court on 13 September 2004.

**[17]** On 9 December 2004, the plaintiff filed the application to set aside the default judgment ('the impugned application') which has neither been executed nor satisfied.

**[18]** When the impugned application came up for hearing on 3 March 2005, the second defendant did not attend despite having been served therewith. The first defendant attended and opposed the impugned application.

**[19]** On 8 December 2005, the learned judge dismissed the impugned application. This is the plaintiff's appeal against the aforesaid decision.

JURISDICTION

**[20]** Learned counsel Mr Su Tiang Joo submitted for the plaintiff that our High Court has jurisdiction to allow the impugned application. He relied on authorities available from Commonwealth jurisdictions viz:

(a) England: *Cannan & Ors v Reynolds And Service* 5 EL & BL 299 [301] 493;and *City of Westminster v Reema Construction Ltd & Ors* 20 Con LR 44;

(b) Canada: *The Bank of Nova Scotia v Kostuchuk* [2003] 173 Man R (2d) and 293 WAC 262; and

(c) Australia: *MacQuarie Bank Ltd v Beaconsfield & Ors* [1992] 2 VR 461.

**[21]** First defendant's learned counsel Mr Andrew Chiew Ban Vooi contended that there is no express provision for the court to set aside the default judgment obtained by the plaintiff upon the plaintiff's own application. He relied on *Cross & Co v Mathews & Wallace* (1903–1904) Vol XX TLR 603.

**[22]** In our judgment, it is trite law that O 42 r 13 of the Rules of the High Court 1980 confers jurisdiction upon our High Court to set aside an order or judgment on the application of the party against whom the order or judgment has been obtained eg the second defendant herein. For that purpose, the application must be made and served on the party who has obtained the order or judgment eg, the plaintiff herein.

**[23]** However, in the instant appeal, the impugned application was not made by the second defendant against whom the judgment has been obtained. It was instead made by the plaintiff in whose favour the judgment has been entered.

**[24]** The impugned application is arguably the first of its kind ever to be filed in our courts, as apparently no local judgment had been submitted for our consideration. It is therefore pertinent for us to consider authorities from Commonwealth jurisdictions.

**[25]** First, in *Cannan & Ors*, the plaintiff had obtained against the defendant a default judgment for an incorrect amount which the defendant knew was a mistake. As soon as the mistake was discovered, a summons to set aside the judgment was taken out by the plaintiff. It was held in England that the courts have a general equitable jurisdiction over their judgments.

**[26]** Order 19 rule 9 of the English Rules of the Supreme Court provided that the court may on such terms as it thinks just set aside or vary any judgment entered in pursuance of that order. This procedural rule was considered in City of Westminster. There, the plaintiff's blocks of flats had developed defects which the plaintiff had employed the fourth defendant and the seventh defendant to put them right. The work was done in two phases, partly by the fourth defendant and the seventh defendant. The plaintiff alleged that both the fourth defendant and the seventh defendant had done their work badly and that they were each separately responsible for defects in different parts of the work. Interlocutory judgment was entered by the plaintiff against the seventh defendant, with damages to be assessed. The plaintiff applied to set aside the interlocutory judgment. The English High Court held inter alia that under O 19 r 9, it has jurisdiction to set aside an interlocutory judgment for damages to be assessed.

**[27]** In *The Bank of Nova Scotia*, Kostuchuk (K) borrowed monies from the bank on behalf of Bomek (B). B defaulted on the loans. The bank obtained default judgments against K for C$2,762.81 ('the first loan') and C$3,206.82 ('the second loan'). K satisfied both the judgments. Subsequently, the bank discovered that there was a mistake, as the amount owing on the second loan was C$26,285.29. The bank applied for the judgment and notice of satisfaction to be set aside. The Manitoba Court of Appeal in Canada followed inter alia Cannan and Others, supra and allowed

A the application. In the exercise of jurisdiction to set aside the default judgment on ground of mistake, the Court of Appeal explained in para [8] as follows:

> [8] The authorities provide that a court will set aside a default judgment where:
>
> (a) the plaintiff or its legal advisor has made a mistake, either in the pleading on which the default judgment is based or by entering default judgment against one or more defendants;
>
> (b) the plaintiff has moved quickly upon discovering the mistake to set aside the default judgment; and
>
> (c) the defendant has not acquired a vested right by virtue of the signing of the default judgment, such as the expiry of a statutory limitation, and the setting aside will not cause prejudice to the defendant that cannot be compensated for by costs and repayment of the judgment, if applicable.

**[28]** The final case cited for the plaintiff is *MacQuarie Bank Ltd*, where the plaintiff bank claimed from the defendant-guarantor the sum of A$15,095,463 being the amount of a guaranteed debt together with interest, or alternatively damages. Upon the defendants' failure to deliver a defence, the plaintiff consciously and swiftly entered judgment in default for damages to be assessed. Three months later, the plaintiff applied to the court seeking to set aside the default judgment because it became concerned that the principal sum might not be recovered upon the assessment of damages. At the hearing of the application, the defendants conceded that the court had jurisdiction to set aside a default judgment on the application of the plaintiff, but contended that the plaintiff had elected to claim only damages and was therefore barred from seeking to set aside the judgment. In allowing the application and setting aside the judgment, the Supreme Court of Victoria, Australia held:

> (1) The discretion to set aside a default judgment pursuant to the rules of court is very wide and there is no need to lay down restrictive rules for applications on behalf of plaintiffs. Exceptional circumstances need not be shown and the discretion is to be exercised having regard to the justice of the case;
>
> (2) The plaintiff needs to show that some useful purpose can be served in setting aside the default judgment, that is, that on its statement of claim there is an arguable case for relief at trial different from that already obtained on default;
>
> (3) Factors which may be taken into account in the exercise of the discretion to set aside a default judgment on the application of the plaintiff include the reason for taking the step of entering judgment, delay in seeking to have the judgment set aside, reasons for that delay and whether there is any consequent prejudice or other prejudice which cannot be remedied; and
>
> (4) Whatever criticism might be made of the plaintiff in consciously and swiftly entering default judgment without warning, and in delaying three months before applying to have the judgment set aside, it would not be just to deprive the plaintiff of its right to sue for the recovery of a sum in excess of A$15m.

**[29]** The above authorities cited for the plaintiff are supportive of the plaintiff's submission on the jurisdiction point.

**[30]** On the other hand, in *Cross & Co*, cited for the first defendant, two persons were sued in the High Court for the price of goods supplied. Judgment was obtained by default against one, and the other had leave to defend, and the action was remitted to the county court. At the trial, the county court judge found as a fact that the debt was contracted by the former solely as agent for the latter, and that the plaintiff had given credit to the latter alone. He adjourned the case to enable an application to be made to set aside the judgment against the agent. This was accordingly done, and the judgment was set aside and the action against both defendants was remitted to the county court. At the second trial, the county court judge entered judgment for the agent and against the principal. On appeal, the English Court of Appeal held that the plaintiff by signing judgment against the agent had conclusively elected to proceed against him, and there was no power to set aside that judgment, so as to revive the right of the plaintiff to proceed against the principal.

*Cross & Co*, was considered in *City of Westminster*, where Peter Bowsher QC learned judge of the English Queen's Bench, explained that *Cross & Co*, was a case of alternative liability between principal and agent and the question of whether the election was irrevocable was not in issue. Hence, *Cross & Co*, was accordingly distinguished in City of Westminster, in which the application raised the issue of whether the election is revocable.

**[31]** We are of the view that on a preponderance of authorities, there can be no doubt that our High Court is vested with the jurisdiction to consider and determine the impugned application.

**[32]** Our view is supported and indeed consistent with O 92 r 4 which provides for the inherent powers of the court in the following words:

> For the removal of doubts it is hereby declared that nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

LIMITED CIRCUMSTANCES FOR SETTING ASIDE

**[33]** The plaintiff took the view that the court is not *functus officio*, even though the default judgment has been perfected, seeking support in:

(1) *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC);

(2) *Badiaddin bin Mohd Mahadin & Anor v Arab Malaysian Finance Bhd* [1981] 1 MLJ 393 (FC); and

(3) *Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Intervenors)* [2003] 1 MLJ 251 (CA);

**[34]** The first defendant argued to the contrary, as the default judgment had been sealed. *Hock Hua Bank*, *Badiaddin* and *Selvam Holding* were also cited in support.

**[35]** We would now embark on an analysis of the above authorities.

**[36]** The appeal in *Hock Hua Bank*, was concerned with the jurisdiction of a judge to inter alia set aside a judgment regularly obtained, drawn up and perfected. The first instance judge had made an order for sale after hearing all the parties in a foreclosure proceeding. The order had been drawn up and perfected. There was no appeal against it. The respondent's application to set it aside was refused. Subsequently, the respondent applied again to set aside the previous orders. That subsequent application was allowed by the first instance judge. On appeal, the Federal Court in a judgment delivered by Chang Min Tat FJ (as he then was) held that the first instance judge was *functus officio* and that the court had no power under any application in the same action to inter alia set aside a judgment regularly obtained after it has been entered, or an order after it has been drawn up, unless it is a judgment by default or made in the absence of a party at the trial or hearing.

**[37]** The Federal Court added that where a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment (p 144 E–G left).

**[38]** In *Badiaddin*, the Federal Court referred to *Hock Hua Bank*, and allowed a final order to be set aside on ground of illegality being in contravention of an express provision of a written law ie, s 13 of the Malay Reservations Enactment (FMS Cap 142). At p 409 Mohd Azmi FCJ (as he then was) explained that:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction. Apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

**[39]** The issue in *Selvam Holdings*, was whether the High Court was *functus officio* once an order is drawn up and perfected. The Court of Appeal speaking through Siti Norma Yaakob JCA (later CJ (Malaya)) followed *Hock Hua Bank*; and *Badiaddin*, and held that the court has unlimited jurisdiction to set aside orders:

(1) where the order contravenes a substantive statutory prohibition rendering it defective on grounds of illegality or lack of jurisdiction; and

(2) where in exceptional cases, the justice of the case requires the court to intervene and correct a serious defect in the order.

**[40]** We are of the view that principles enunciated in the above three authorities do buttress the plaintiff's contention that the court is not functus officio even though a

default judgment has been perfected. However, these three authorities have also reaffirmed that the jurisdiction to set aside such a judgment is not to be exercised as a matter of course, like day following night, but may be exercised in limited circumstances only eg, where there is:

(a) breach of the rules of natural justice;

(b) lack of jurisdiction;

(c) illegality ie contravention of a substantive statutory provision;

(d) serious defect; or

(e) fraud.

**[41]** The plaintiff must discharge the burden of proving that the impugned application comes within the ambit of any of these limited circumstances.

**[42]** With the foregoing principles in mind, we shall now consider the merits of the instant appeal.

ABUSE OF PROCESS

**[43]** The plaintiff argued that the court can set aside the default judgment without deciding on the issue of election raised in the first defendant's amended defence. Support was sought in:

(1) *S Kaprow & Ca LTD v Maclelland & Co LTD* [1948] 1 KB 618 (CA);

(2) *City of Westminster*; and

(3) *MacQuarie Bank Ltd*; and

(4) *Cannan*.

**[44]** The first defendant responded that setting aside the default judgment would run counter to the earlier order of this court in *HSBC Bank Malaysia Bhd*, which had allowed the first defendant to amend its defence to include the issue of election.

**[45]** Upon considering *S Kaprow & Co Limited*, we found that the defendant there had applied to have the action stayed, which was allowed by the English Court of Appeal.

**[46]** It is to be noted that the application in *S Kaprow & Co Limited*, for a stay of the action is readily distinguishable from that in the instant appeal which concerns an application to set aside a default judgment. We are therefore unable to see how the plaintiff is able to garner any support from *S Kaprow Co Limited*.

*City of Westminster*; *MacQuarie Bank*; and *Cannan*, have been considered earlier in this judgment. These three authorities do not relate to the issue of election included in the amended defence which had been allowed earlier by this court in *HSBC Bank Malaysia Bhd* CA. Hence, we are of the view that they are not of any assistance to the plaintiff.

**[47]** Reverting to the mainstream in the instant appeal, it is to be noted that the plaintiff has consistently mounted challenges to the first defendant's right to raise the issue of election in its amended defence. It was only after such challenges have failed, first in the High Court, then in the Court of Appeal and finally in the Federal Court, that the plaintiff made the impugned application in the High Court. The dismissal of the impugned application has now become the subject matter of the instant appeal.

**[48]** It is abundantly clear to us that the impugned application was made for the purpose of forestalling, preempting or preventing the first defendant from raising the issue of election in the amended defence at the trial, where the merits or otherwise thereof would have to be considered and determined in due course. The impugned application, if allowed, would have the effect of stifling or negating the earlier order of this court made in *HSBC Bank Malaysia Bhd*. It is an obvious illustration of an abuse of the process of the court which should not be permitted and which O 92 r 4 seeks to prevent.

MISTAKE AND DELAY

**[49]** It was argued for the plaintiff that:

(1) the plaintiff's solicitors were mistaken in obtaining the default judgment against the second defendant, not being aware that it could result in the first defendant contending that the plaintiff is now estopped from claiming against the first defendant;

(2) the plaintiff had never intended to release the first defendant from liability based on the tort of conversion; and

(3) there was no delay on the part of the plaintiff in filing the impugned application.

**[50]** In response, it was contended for the first defendant that there was no mistake when the plaintiff's solicitors applied to enter judgment against the second defendant; and that there was considerable delay on the part of the plaintiff's solicitors in filing the impugned application.

**[51]** On the question of the existence or otherwise of the mistake on the part of the plaintiff's solicitors, we find it necessary to immediately emphasize that the default judgment has been obtained by the plaintiff at the instance of the plaintiff's solicitors who must have properly and meticulously considered the implications thereof. Had there been such a mistake, the plaintiff's solicitors would have, on 22 January 2001, refrained from sending the draft copy of the default judgment dated 16 January 2001 for approval by the first defendant's solicitors, who had duly approved and returned it to the plaintiff's solicitors for eventual perfection on 29 January 2001.

**[52]** Further, the plaintiff solicitors had apparently made no effort to rectify the mistake timeously. It was only after some 47 months ie from 29 January 2001 to

9 December 2004 that they took steps to file the impugned application. As they had not moved quickly to apply to set aside the default judgment, the irresistible inference is that they are holding affirmatively and positively to the default judgment. That delay in filing the impugned application is somewhat inordinate, and the act the plaintiff's solicitors in obtaining the default judgment can hardly be construed as a mistake.

CONCLUSION

**[53]** On the facts and circumstances alluded to above, we are unable to find any error in the exercise of the discretion by the learned judge in dismissing the impugned application. Hence, we dismissed this appeal with costs and affirmed the decision of the High Court.

**[54]** By consent of the parties as alluded to above, the decision herein is binding on the parties in Civil Appeal No 10.

**[55]** Deposits to the first defendant on account of taxed.

*Appeal dismissed with costs.*

Reported by Peter Ling